In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 934

WYLIE MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, 1b-7b) is not yet officially reported. The Board's initial decision and order (Pet. App. B, 7b-40b) are reported at 162 NLRB 799; its supplemental decision and order (Pet. App. B, 41b-68b) are reported at 170 NLRB No. 112.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1969 (Pet. 2). The petition for a writ of certiorari was filed on December 8, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that a majority of the employees, without coercion by the union, had signed cards authorizing the union to represent them for purposes of collective bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. A, 1a-2a).

STATEMENT

During the last week of February, 1966, Local 850, International Association of Machinists and Aerospace Workers, AFL-CIO, began an organizing campaign among the 36 production and maintenance employees at petitioner's Oklahoma City plant (R. 341; 15, 142).[1] Petitioner immediately embarked on an extensive campaign of restraint and coercion, which included interrogating employees about their union activities, threatening them with reprisals if they selected a union representative, and promising them benefits if they rejected the Union (R. 344-346, 349-352; 87-89, 30-31, 63-65, 75, 103-104, 67-68, 43, 44, 53).

[1] "R." refers to the joint appendix filed in the court below.

On March 7, having received signed authorization cards from 30 employees,[2] the Union informed petitioner that it had attained majority status and demanded recognition as the employees' exclusive bargaining representative (R. 342; 197-198). On March 9, without awaiting petitioner's reply, the Union filed a petition for a Board election. Petitioner rejected the Union's request to bargain the following day, insisting upon an election (R. 342; 21, 234). A consent election agreement was entered into, scheduling an election for March 29 (Pet. App. B, 32b).

In the meantime, petitioner continued its program of intimidation, threatening its employees with a shortened workweek, a reduction in wages, the closing of the plant, and the discharge of union supporters if the employees voted for the Union (R. 353-354, 355-359; 32, 45-46, 53-55, 56-57, 89-90). The Union lost the election by a single vote, 18 to 17 (R. 343).

The Board found that, throughout the period of the Union's organizational campaign, petitioner had engaged in widespread acts of restraint and coercion which violated Section 8(a)(1) of the Act and warranted setting the election aside (Pet. App. B, 29b-31b, 37b-38b). The Board further found that the Union had obtained, without coercion, signed authorization cards from a majority of the employees in the unit when it requested recognition.[3] Rejecting peti-

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[2] The cards unequivocally authorized the Union to represent the signatories in collective bargaining (Pet. App. B, 33b).

[3] Although the Union had submitted 30 cards to petitioner, only 26 were introduced at the Board hearing (R. 364). The

tioner's contention that the cards were totally unreliable because of Union coercion, the Board found that, although three employees had been threatened by one Union agent during the campaign, only one had signed an authorization card relied upon by the Union to establish its majority,[4] and that these threats were not "sufficiently extensive or widespread among the employees to establish a pervasive pattern of threats, coercion or intimidation" in the Union's effort to secure authorization cards (Pet. App. B, 56b, 57b). Finally, the Board found that petitioner's refusal to bargain was not in good faith, relying in part on its Section 8(a)(1) violations, and thus that petitioner violated Section 8(a)(5) of the Act (Pet. App. B, 34b-35b). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to bargain with the Union upon its request. The Board found that a bargaining order would be appropriate even had there been no violation of Section 8(a)(5), in order to remedy petitioner's Section 8(a)(1) violations (Pet. App. B, 36b, 38b-40b, 57b-58b, 8b.)

The court of appeals sustained the Board's findings and conclusions, and enforced its order. The court found that a bargaining order was warranted under the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575.

Board invalidated one of these (see n. 4, below), leaving the Union with 25 valid cards for a unit of 36 employees. (Pet. App. B, 33b, 56b, n. 18.)

[4] The Board did not count this card in computing the Union's majority status (Pet. App. B, 56b).

ARGUMENT

Petitioner's basic contention is that the Board applied a stricter standard in finding that its misconduct precluded the holding of a fair and free election than it did in finding the Union's misconduct in the solicitation of authorization cards was not sufficient to invalidate the cards *in toto* (Pet. 5-8). But, as the court below properly found, "[w]hen the record is viewed as a whole, it does not disclose inconsistency by the Examiner in his evaluation of the coercive effect of statements by company representatives on the one hand and union adherents on the other" (Pet. App. B, 5b).

What the Board found, on the record here, was that petitioner's acts of restraint and coercion were more extensive and pervasive in their effect than were the Union's acts. The propriety of this conclusion presents essentially only a factual issue not warranting further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Since petitioner interrogated, threatened, and intimidated individual employees on at last 20 separate occasions, the Board not unreasonably concluded that its acts were sufficient to destroy the Union's majority status and preclude the holding of a fair and free election. On the other hand, since there were only three isolated instances of Union misconduct, only one of which affected an authorization card relied upon to establish the Union's majority, the Board properly concluded that the Union's acts were not "sufficiently extensive or widespread among the em-

ployees to establish a pervasive pattern of threats, coercion or intimidation" (Pet. App. B, 57b).

The cases petitioner cites (Pet. 8-9) do not require a contrary conclusion. In *National Labor Relations Board* v. *James Thompson & Co.*, 208 F. 2d 743, 746-748 (C.A. 2), of the 40 employees who had signed cards, 7 were told that they would lose their jobs unless they did, and 11 employees were subjected to other coercive statements; this is a more pervasive pattern of union intimidation than is present here. In *National Labor Relations Board* v. *Clement Bros. Co.*, 407 F. 2d 1027 (C.A. 5), the employer coerced his employees on at least 16 separate occasions to join a company union, in violation of Section 8(a)(2) of the Act. Although the court in *National Labor Relations Board* v. *S.S. Logan Packing Co.*, 386 F. 2d 562, 565-568 (C.A. 4), noted that the four affidavits by employees alleging that they had been coerced into signing union cards afforded the employer a basis for doubting the union's majority, its underlying rationale for refusing to sustain the Board's bargaining order was its view that "a card check is not a reliable indication of the employees' wishes". This view was rejected in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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